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C. *Johnson should not be excused for his reckless and willful failure to pay over Koba's trust fund taxes on the grounds of "reasonable cause"*

Johnson contends that his actions "were not willful notwithstanding knowledge of prior unpaid taxes because he acted with reasonable cause." (Br. 16.) As the majority of courts have recognized, however, there is no "reasonable cause" exception to the standard of willfulness. *See e.g.*, *Phillips*, 73 F.3d at 942; *Keller*, 46 F.3d at 855; *Brewery, Inc.*, 33 F.3d at 593; *Olsen v. United Sates*, 952 F.2d 236, 240-241 (8th Cir. 1991); *Sorenson v. United States*, 521 F.2d 325, 328 (9th Cir. 1975); *Harrington v. United States*, 504 F.2d 1306, 1316 (1st Cir. 1974); *Pacific Nat'l Ins. Co. v. United States*, 422 F.2d 26, 33 & n. 19 (9th Cir. 1970); *Monday*, 421 F.2d at 1216; *cf. Logal v. United States*, 195 F.3d 229, 233 (5th Cir. 1999) (recognizing theoretical possibility that reasonable cause could negate willfulness, but indicating that no taxpayer has "carried that pail up the hill"). Under the majority view, an individual who knowingly or recklessly disregards whether trust fund taxes are being paid over to the Government, and who uses the corporation's available funds to pay the claims of creditors, is willful under the plain terms of Section 6672 – he cannot be excused because of his good faith or lack of bad motive. *See Phillips*, 73 F.3d at 942 ("No bad motive need be proved, and conduct motivated by reasonable case, such as meeting the payroll, may be 'willful'."); *Harrington*, 504 F.2d 1316 (same); *Monday*, 421 F.2d at 1216 (same). Although the Tenth Circuit has departed from the majority view and adopted a "reasonable cause" exception, *see Finley v. United States*, 123 F.3d 1342, 1347-1348 (10th Cir. 1997),

and the Second Circuit has recognized an even more limited exception, *see Winter*, 196 F.3d at 345, this Court has not done so. Indeed, the only court in this circuit to address the reasonable cause exception has stated that "the Tenth Circuit's opinion [in *Finley*] contrasts with prior, better reasoned, decisions by the First, Seventh, and Ninth Circuits which rejected a reasonable cause' defense." *Mardousian v. United States*, 98-2 U.S. Tax Cas. (CCH) ¶50,754 (D. Md. 1998).

We maintain that the courts that have recognized a "reasonable cause" exception have failed to give due consideration to the mandate imposed by § 7501 that the withholding taxes be held in trust by the employer. That is, a responsible person must segregate the funds and his failure to do so indicates his willfulness. *See e.g.*, *Smith v. United States*, 894 F.2d 1549, 1554-1555 (11th Cir. 1990). Moreover, we submit that recognition of a reasonable cause defense seriously undermines Section 6672 by shifting the focus from encouraging high-level employees to stay abreast of the company's withholding and payment of employees' taxes, to encouraging them to engage in good faith, but unsuccessful, after-the-fact attempts to pay the delinquent withholding taxes, which leave the Government without the withheld taxes even though the employees from whom the taxes were withheld must be given credit. *See, e.g.*, *Olsen*, 952 F.2d at 241; *Monday*, 421 F.2d at 1217-1218.

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Excerpts from Page 2 of United States of America's Reply Memorandum in Support of Its Motion for Summary Judgment in the United States District Court for the District of Maryland

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Plaintiff's first argument on this point is that his actions for the third quarter of 1994 were not willful because he had no notice of previous delinquent taxes.[1] Previous quarters, however, are not at issue here.

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[1] We do not know the "previous delinquent taxes" to which plaintiff refers. The returns for the two quarters prior to the period at issue show no balance due. (Affidavit of Ford T. Johnson, Jr. ("Johnson Aff."), Exs. A, B.)